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## THE AMERICAN HAGUE TRIBUNAL

The statement that, as a matter of last resort, we are governed by courts rather than by our legislatures, and that the Supreme Court of the United States is the most powerful tribunal in the world, has so often been made as to be a truism. And yet, perhaps few of us have taken time, amidst the rush of business and in our persual of the thousands of cases which are yearly decided by the courts, to take an account of the march of events, and to realize not merely the extent of this judicial power but its yearly extension and advancement.

It has only been recently, indeed, that the problems of government have really weighed upon us and that our attention has been seriously called to them. We have in a large measure been a frontier and a pioneer people. We have had a continent to develop and to exploit. There has been room for all, and the doctrine that one must so use his own as not to injure that of another has had in it but little personal meaning or significance. Our political and legal problems indeed have been theoretical and general rather than personal and practical. In the future, however, the province of government will be tested to its limits. It is coming to be so tested even to-day. Not merely has the public domain, which in the past has been our great social outlet and safety valve become nearly exhausted; not merely is the struggle for existence becoming keener and keener; not merely is the law being called upon more and more to determine the rights of individuals, within the respective states and to determine how far the private individual may or may not go, in the exercise and enjoyment of the liberty and rights of property on which the Anglo-Saxon lays so much stress, but our problems are becom-

ing interstate, and almost international in their aspect and in their scope.

In the solution of these interstate questions and in the laying down of the rules of interstate conduct which shall govern and control and form the interstate common law of the future, Congress so far has taken and perhaps can take but little part. The duty has fallen upon, perhaps has been assumed by, the Supreme Court of the Nation. Its assumption has been justified not under any specific grant of power contained in the Constitution, but under the clause and under the clause alone which gives to the Supreme Court of the Nation original jurisdiction in "controversies between two or more states."

The Supreme Court of the Nation indeed, in so far as the several states of the Union are concerned, is coming to be a sort of Hague Tribunal, but a Hague Tribunal which has the power of compelling a submission to its jurisdiction and of enforcing its mandates and decrees. As such a tribunal, it is evolving and developing an interstate international law of its own, whose foundation principle is equality of rights,<sup>1</sup> and whose method of pleading and procedure is divorced from the technicalities of the past and allows the fullest latitude of investigation and research. "Sitting as it were, as an international as well as a domestic tribunal," says Chief Justice Fuller in the case of *Kansas v. Colorado*,<sup>2</sup> "we apply Federal Law, State Law and International Law, as the exigencies of the particular case may demand; and we are unwilling in this case to proceed on the mere technical admissions made by the demurrer. Nor do we regard it as necessary, whatever imperfections a close analysis

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<sup>1</sup> "One cardinal rule underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of *Missouri v. Illinois*, 180 U. S. 208, the action of one state reaches, through the agency of natural laws, into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes and decisions this court is practically building up what may not improperly be called interstate common law." Mr. Justice Brewer in *Kansas v. Colorado*, 27 Sup. Ct. Rep. 655, 667.

<sup>2</sup> 22 Sup. Ct. Rep. 522, 560.

of the pending bill may disclose, to compel its amendment at this stage of the litigation. We think proof should be made as to whether Colorado is herself actually threatening to exhaust the flow of the Arkansas river in Kansas; whether what is described in the bill as the underflow is the subterranean stream flowing in a known and defined channel, and not merely percolating through the stata below; whether certain persons, firms and corporations in Colorado must be made parties thereto; what lands in Kansas are actually situated on the banks of the river, and what, either in Colorado or Kansas, are absolutely dependent on water therefrom; the extent of the water-shed or the drainage area of the Arkansas river; the possibilities of the maintenance of a sustained flow through the control of flood waters; in short, the circumstances, a variation in which might induce the court to either grant, modify or deny the relief sought, or any part thereof. The result is that in view of the intricate questions arising on the record, we are constrained to forbear proceeding until all the facts are before us on the evidence."

The exercise of this jurisdiction has as yet mainly been invoked in the cases where the citizens of one state, in the disposition of their sewage, have polluted running streams to the detriment of the citizens of the states through which they afterwards flow,<sup>3</sup> or have diverted and exhausted these streams for irrigation or mining purposes, so as to deprive other states of their just share of the waters thereof,<sup>4</sup> or have so conducted their manufacturing and mechanical operations as to befoul the natural atmosphere and to injure the natural resources and vegetation of adjoining states.<sup>5</sup> A broad groundwork on which to build an extended jurisdiction has, however, been laid. In the cases decided, the Supreme Court of the United States has assumed jurisdiction as a matter of necessity. Its jurisdiction, paternalistic though it may seem, is justified by an assumption of a state sovereignty rather than by a negation of it and has been made necessary by the recognition of that sovereignty in the

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<sup>3</sup> *Missouri v. Illinois*, 180 U. S. 208, 21 Sup. Ct. Rep. 331; S. C. 200 U. S. 496, 26 Sup. Ct. Rep. 268.

<sup>4</sup> *Kansas v. Colorado*, 22 Sup. Ct. Rep. 552; S. C. 27 Sup Ct. Rep. 655.

<sup>5</sup> *Georgia v. Tennessee Copper Co.*, 206 U. S. 230; 27 Sup. Ct. Rep. 618.

law of the past.<sup>6</sup> Under the old law, it is true, that the lower riparian owner or the owner of the vegetation injured by the nuisance, had a measure of redress, but the redress could, without the consent of the state, only be against the particular individuals offending and could only be asserted in the local courts of the state or the federal courts in the districts in which the malefactors resided, and in such cases was determined by the local law and the local custom. Even the jurisdiction of the local courts was restricted and their mandates and decrees confined to persons and objects within their borders.<sup>7</sup> So too, even in matters affecting the public health or the protection of its natural resources, the state as a whole was powerless, and the public interests, on whose immediate protection the whole future of communities or of the state itself might depend, were dependent upon the willingness of some individual property owner to undertake the burdens and expenses of a vexatious law suit. Such a

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<sup>6</sup> "The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The state owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a state for an injury to it in its capacity of *quasi-sovereign*. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power. The alleged damage to the state as a private owner is merely a make weight and we may lay on one side the dispute as to whether the destruction of forests has led to the gulying of its roads. The caution with which demands of this sort on the part of a state for relief from injuries analogous to torts, must be examined, is dwelt upon in *Missouri v. Illinois*, 200 U. S. 496, 26 Sup. Ct. Rep. 268. But it is plain that some such demands must be recognized if the grounds alleged are proved. When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi-sovereign* interests; and the alternative to force is a suit in this court. Some peculiarities necessarily mark a suit of this kind. If the state has a case at all it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up *quasi-sovereign* rights for pay." Mr. Justice Holmes in *Georgia v. Tennessee Copper Co.*, 27 Sup. Ct. Rep. 619.

<sup>7</sup> *Mississippi & Missouri R. Co. v. Ward*, 2 Black 485, 67 U. S. 311.

system for determining controversies of the magnitude of those under consideration, could never have proved satisfactory and as the country develops and the states become empires in population and in power, can never be relied upon to maintain harmony among and to make and preserve a united nation of the people and the states represented in the vast American commonwealth. Nor could Congress itself well act in such matters. Not merely would every attempt on its part give rise to political combination and sectional log-rolling, to the combining of section against section and locality against locality, so that state and personal rights would be dependent upon political strength and the ability to combine, but there seems to be no warrant in the Constitution itself for any such assumption of power. The polluting of the air and the befouling of streams can for instance hardly be said to be interferences with interstate commerce. On the other hand, the grant to the Federal Supreme Court of jurisdiction over controversies between two or more states, would seem to have anticipated controversies of this very nature. And that there is need of some tribunal to settle such controversies there can be little doubt—a tribunal of the nature of the Hague Tribunal, but with the power of enforcement which that tribunal does not possess.

The interstate jurisdiction of the Supreme Court indeed, is based on the right and the necessity of adjudicating on matters which are interstate and almost international in their nature, and is in no sense justified on the theory that the laws or even the Constitution of the United States are involved. It has in fact, as we have before said, been exercised in cases where Congress perhaps could not have legislated at all, that is to say in cases in which no power of legislation has either directly or inferentially been delegated to that body. It arises out of the inherent necessity of the case and the otherwise inadequacy of the national system of jurisprudence.

"The state of Colorado," says Chief Justice Fuller in his opinion in the case of *Kansas v. Colorado*,<sup>8</sup> "contends, that as a sovereign and independent state, she is justified if her geographical situation and material welfare demand it in her judgment, in consuming for beneficial purposes all the waters within her boundaries; and that as the sources of the Arkansas river are in Colorado, she may absolutely and wholly deprive Kansas

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<sup>8</sup> 22 Sup. Ct. Rep. 558.

and her citizens of any use of or share in the waters of that river. She says that she occupies towards the state of Kansas the same position that foreign states occupy towards each other, although she admits that the Constitution does not contemplate that controversies between members of the United States may be settled by reprisal or force of arms, and that to secure the orderly adjustment of such differences power was lodged in this court to hear and determine them. The rule of decision, however, it is contended, is the rule which controls foreign and independent states in their relations to each other, that by the law of nations the primary and absolute right of a state is self-preservation; that the improvement of her revenues, arts, agriculture, and commerce are incontrovertible rights of sovereignty; that she has dominion over all things within her territory; including all bodies of water, standing or running within her boundary lines; that the moral obligations of a state to observe the demands of comity cannot be made the subject of controversy between states; and that only those controversies are justiciable in this court which, prior to the Union, would have been just cause for reprisal by the complaining state; and that, according to international law, reprisal can only be made when a positive wrong has been inflicted or rights *stricti juris* withheld. But when one of our states complains of the infliction of such wrong or the deprivation of such rights by another state, how shall the existence of cause of complaint be ascertained, and be accommodated if well-founded? The states of the Union cannot make war upon each other. They cannot "grant letters of marque and reprisal." They cannot make reprisal on each other by embargo. They cannot enter upon diplomatic relations and make treaties. As Mr. Justice Baldwin remarked in *Rhode Island v. Massachusetts*: "Bound hand and foot by the prohibitions of the Constitution, a complaining state can neither treat, agree, nor fight with its adversaries without the consent of Congress. A resort to the judicial power is the only means for legally adjusting or persuading a state which has possession of disputed territory to enter into an agreement or compact relating to a controverted boundary. Few, if any, will be made if it is left to the pleasure of the state in possession; but when it is known that some tribunal can decide on the right, it is most probable that most controversies will be settled by compact." 12 Pet. 7269, L. Ed. 1261. "War," said Mr. Justice Johnson, "is a suit prosecuted by the sword; and where the question to be

decided is one of original claim to territory, grants of soil made *flagrante bello* by the party that fails can only derive validity from treaty stipulations." 12 Wheat. 528, 6 L. Ed. 717. "The publicists suggest as just causes of war, defense, recovery of one's own, and punishment of an enemy. But as between states of this Union, who can determine what would be a just cause of war? Comity demanded that navigable rivers should be free, and therefore the freedom of the Mississippi, the Rhine, the Scheldt, the Danube, the St. Lawrence, the Amazon, and other rivers has been at different times secured by treaty; but if a state of this Union deprives another state of its rights in a navigable stream, and Congress has not regulated the subject, as no treaty can be made between them, how is the matter to be adjusted?"

The conclusions arrived at, it will be seen, involve both an assertion of state sovereignty, and a negation of that sovereignty. They apply the doctrine of *sic utere tuo ut alienum non laedas* to states as well as to individuals. They seem to confer property as well as political rights upon a citizen of the United States. They apply in a large sense the principle that the welfare of the Nation as a whole, is the highest law, and that the individual unit must be protected in order that the whole may grow in strength. They apply a republican doctrine of equality among the states as well as among the people who are residents therein, and above all, they recognize a paternalistic interest on the part of the states in the welfare of their inhabitants which will justify a suit in the name of the state for their protection. "In deciding this case on demurrer we said, referring to the opinion in *Missouri v. Illinois*," said the Supreme Court of the United States in *Kansas v. Colorado*,<sup>9</sup> "the court there ruled that the mere fact that a state had no pecuniary interest in the controversy would not defeat the original jurisdiction of this court, which might be invoked by the state as *parens patriae*, trustee, guardian, or representative of all or a considerable portion of its citizens; and that the threatened pollution of the waters of a river flowing between states, under the authority of one of them, thereby putting the health and comfort of the citizens of the other in jeopardy, presented a cause of action justiciable under the Constitution. In the case before us, the state of Kansas files her bill as representing and on behalf of her citizens, as well as in vindication of her

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<sup>9</sup> 27 Sup. Ct. Rep. 655, 668.



alleged rights as an individual owner, and seeks relief in respect of being deprived of the waters of the river accustomed to flow through and across the state, and the consequent destruction of the property of herself and of her citizens and injury to their health and comfort. The action complained of is state action, and not the action of state officers in abuse or excess of their powers. It is the state of Kansas which invokes the action of this court, charging that through the action of Colorado, a large portion of its territory is threatened with disaster. In this respect it is in no manner evading the provisions of the 11th Amendment to the Federal Constitution. It is not acting directly and solely for the benefit of any individual citizen to protect his riparian rights. Beyond its property rights it has an interest as a state in this large tract of land bordering on the Arkansas river. Its prosperity affects the general welfare of the state. The controversy rises, therefore, above a mere question of local private right and involves a matter of state interest, and must be considered from that standpoint."

The real difficulty in the way of the jurisdiction is to be found in the matter of its enforcement. It is of course assumed, that if the mandates of the court are disobeyed, obedience can be enforced in the last extremity by the army and the naval forces of the nation. But both the President of the United States as commander-in-chief of the army, and the National Congress itself, might refuse to obey such a mandate and in such an event they could hardly be compelled to act. "Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed," says Chief Justice Chase, in his famous opinion in *Mississippi v. Johnson*.<sup>10</sup> "By the first of these acts he is obliged to assign generals to command in the several military districts, and to detail sufficient military force to enable such officers to discharge their duties under the law. By the supplementary act, other duties are imposed on the several commanding generals, and these duties must necessarily be performed under the supervision of the President, as commander-in-chief. The duty thus imposed upon the President is in no just sense ministerial. It is purely executive and political. An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized in the language of Chief Justice Marshal, as "an

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<sup>10</sup> 4 Wallace 475.

absurd and excessive extravagance. The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both when performed are in proper cases subject to its cognizance."

Whether as in the case of *Chisholm v. Georgia*, an affirmative exercise of the powers referred to will lead to open defiance and to the adoption of a constitutional amendment which will take away the jurisdiction, is also yet to be seen. These questions must be met as the occasion is presented. So far the Supreme Court has granted no affirmative relief,<sup>11</sup> and in each case has decided adversely to the petitioners on the merits. The time must come, however, when affirmative relief will be decreed, and the power of the court and the willingness of the people to stand behind its mandates will be put to the extreme test. One thing is sure and that is, that as our country is settled, our interests conflict, the struggle for existence grows keener and keener and our states in population and in power become empires in themselves, either state lines must be swept away altogether, or some sort of interstate Hague Tribunal maintained which shall be enabled and empowered to settle those controversies which are interstate and almost international in their nature, and which, if arising between nations, could only be settled by treaty or negotiation, and if these means failed, by the arbitrament of arms. This is no doubt, a government by the judiciary carried to its extremest limits, but it would seem to be the only method by which a nation such as ours is destined to become can be held together. Mr. Bryce, it is true, has stated that the state "is now merely a part of the grander whole which seems to be slowly absorbing its functions and stunting its growth as the great tree stunts the shrubs over which its spreading boughs have begun to cast their shade," but local and communal interests are as strong as ever and are not dependent upon state lines or state organizations. State lines have usually been selected indeed, because they have been the natural geographic boundaries, and the people in the districts which they separate have often had local and divergent interests to protect. The people south of the southern boundary line of the state of Colorado would not be the less interested in the waters of their rivers if the state boundary line were abolished.

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<sup>11</sup> Except in suits to settle boundary disputes and for the collection of state debts.

Localities must exist under any political system and the state, in most instances, can serve as a unit as well as any other division. It is as we have said, noticeable that the American states have largely been separated and differentiated on topographical lines. Virginia differs from West Virginia in its natural geography, resources and accessibility, and Wisconsin from Illinois. State boundaries have as a rule, been drawn along natural and not along arbitrary lines. It is also true, as Mr. Bryce asserts, that the state "does not interest its citizens as it once did," and that "men do not now say, like Ames in 1782, that their state is their country." It is true that the migratory habits of our people and modern commercialism have separated us from our traditions, and that the rocks and rills which are most loved, are often those of the state or country of our boyhood's and not of our manhood's days. It is true that in wandering, as we do, from state to state, we destroy much of our sentiment. But though commercialism has destroyed these things, it has given a keener, more selfish and therefore more aggressive interest in the natural wealth and resources which are around us, even though they are to be found in the state of our adoption and not the state of our birth. There can be but little doubt, therefore, that the clashing interests of the sections will in the future call more and more for settlement and adjustment, and that the interstate jurisdiction of the Supreme Court will not only be constantly invoked but will, as time goes on, become more and more necessary.

*Andrew Alexander Bruce.*